

below. In the event that the Commission finds that effective competition is not present, the operator would be required to submit justifications for any rate increases taken during the pendency of the petition and would be subject to rollbacks and refunds to the extent such increases exceed the permitted regulated level.⁴²

This conditional deregulation procedure will effectuate Congress' intent to provide immediate regulatory relief to cable operators that face effective competition. The 1996 Act was approved on February 8, 1996 and nothing therein suggests that Congress intended for there to be any delay in the transition to deregulation for systems subject to effective competition on that date or thereafter. Moreover, as the Commission itself previously has recognized, consumers are fully protected by the Commission's authority to order refunds and rollbacks in the event that the Commission determines that effective competition is not present.⁴³

With respect to the timetable for the Commission's review of effective competition petitions, the Commission should establish deadlines for the filing of oppositions and replies, as well as for Commission action, based on the current provisions governing LFA consideration of petitions filed by cable operators asserting a change in the operators' regulatory status. See 47 C.F.R. § 76.915. Specifically, oppositions would be due 15 days following public notice of the petition (which should rarely, if ever, occur later than one

⁴²The effects of the conditional deregulation described above would be limited to the provisions of the Communications Act and the Commission's rules relating to rate setting and rate uniformity. Other regulatory restrictions that are not readily resolved by refunds and prospective rate adjustments, such as the buy-through prohibition, would remain in effect until the Commission had acted on the cable operator's petition.

⁴³See Rate Order, 8 FCC Rcd at 5694 (discussing automatic stay of rate regulation upon the filing of a timely petition for reconsideration of an LFA's certification. See also 47 C.F.R. § 76.911(c).

week following the filing date); replies would be due seven days thereafter; and the Commission would be required to issue a decision within 30 days after the close of the pleading cycle. Moreover, the petition should be deemed granted immediately if no oppositions are filed within the designated period or upon the submission to the Commission of written concurrences on behalf of all relevant LFAs. Finally, the Commission should reaffirm that an effective competition petition can be filed at any time, including in response to a CPST complaint or in response to an LFA's initial certification application.

II. CPST RATE COMPLAINTS.

As originally enacted in 1992, Section 623(c)(1)(B) of the Communications Act, 47 U.S.C. § 543(c)(1)(B), permitted either subscribers or franchising authorities to file complaints with the Commission regarding cable programming services tier ("CPST") rate increases. As amended by Section 301(b)(1) of the 1996 Act, Section 623(C) of the Communications Act permits only LFAs to file CPST rate complaints with the Commission, and only if the LFA receives subscriber complaints within 90 days after a rate increase becomes effective.⁴⁴ Furthermore, the Commission is required to "issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review."⁴⁵ The Commission has adopted interim rules implementing this new CPST rate complaint process and has proposed to adopt such interim rules as final. Notice at ¶¶ 21-22, 78.

The interim rules adopted by the Commission give an LFA a period of 180 days from the effective date of a CPST rate increase to file a complaint with the Commission regarding

⁴⁴See 1996 Act, § 301(b)(1), to be codified at Communications Act, § 623(c).

⁴⁵Id.

the increase. Id. at ¶ 21-22. Prior to filing such a complaint, however, the LFA must have received, within 90 days of the rate increase, more than one subscriber complaint concerning the increase. Id. The LFA also must provide the cable operator with written notice of the LFA's intent to file a complaint with the Commission and give the operator at least 30 days to submit to the LFA the FCC forms used to justify the rate increase. Id.

F&W generally supports this process insofar as it gives the LFA discretion to make an initial determination as to whether a formal rate proceeding should be commenced.⁴⁶ However, the timeline adopted by the Commission should be modified so as to ensure a more expeditious resolution of the status of CPST rate increases. In addition, the Commission should adopt additional safeguards designed to allow cable operators to more fully evaluate and respond to rate complaints.

First, the Commission should require the LFA to provide the cable operator with a copy of each subscriber complaint regarding a CPST rate increase within 10 days of its receipt by the LFA. Under the 1996 Act's new CPST rate review process, refunds begin to accrue as soon as the LFA receives a valid subscriber complaint, not when Form 329 is filed with the Commission;⁴⁷ thus, it is essential that cable operators be given notice of their

⁴⁶F&W also agrees with the Commission's proposal to "eliminate the requirement that operators must include the name, mailing address, and telephone number of the Cable Services Bureau of the Commission on monthly subscriber bills." Notice at ¶ 90. The only purpose of requiring such information was to help subscribers direct their complaints. See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd 4119, 4186 (1994). Since subscribers may no longer file complaints directly with the Commission, there is no need for cable operators to list such information. Likewise, cable operators should no longer be required to list the LFA name and address on each subscriber bill, as currently required by Section 76.309(c)(3)(i)(6) of the Commission's customer service rules. Such information is only necessary on bills which reflect CPST rate increases subject to the complaint window.

⁴⁷See 1996 Act, § 301(b)(1)(B), to be codified at Communications Act, § 623(c)(1)(C).

potential liability as soon as possible. Moreover, as the Commission is well aware from its experience under the original rate complaint process, many "CPST" complaints are filed by nonsubscribers or concern matters other than CPST rates.⁴⁸ Requiring the LFA to provide copies of complaints to the cable operator not only will allow the operator to determine the validity of the complaint, but also will assist the operator in promptly addressing non-CPST rate issues that the subscriber may be raising.

Second, the Commission should clarify the elements of a valid CPST complaint. For example, the Commission should make clear that the subscriber complaints upon which the LFA relies in pursuing Commission review must clearly indicate an intent on the part of the subscriber to complain about CPST rates (as opposed to rates for other levels of service or equipment).⁴⁹ The Commission also should confirm that an LFA complaint filed with the Commission will be subject to dismissal if the underlying subscriber complaints are invalid or are withdrawn in writing.

Third, in order to further expedite the process, the Commission should adopt two other modifications to its current timetable. Specifically, the 30-day period for a cable operator to submit its rate justification (or other defense) should commence as soon as the LFA has received and forwarded to the cable operator two valid CPST rate complaints. In

⁴⁸See, e.g., Suburban Cable TV Co. Inc. (East Drumore, PA), DA 95-391 (CSB, rel. March 2, 1996) (dismissing CPST complaint pertaining only to basic equipment). Accord Suburban Cable TV Co. Inc. (East Greenville, PA), DA 95-1184 (CSB, rel. June 6, 1995) (basic rates); Time Warner Cable (Charlotte, NC), DA 95-1347 (CSB, Rel. June 21, 1995) (basic equipment); Century Cable TV, DA 95-247 (CSB, rel. Feb. 17, 1995) (basic-only system); Sammons Communications, Inc. (University Park, TX), DA 95-216 (CSB, rel. Feb. 13, 1995) (non-subscriber).

⁴⁹In addition, where the cable operator offers more than one CPST, the subscriber complaints must clearly indicate which tier (or tiers) are at issue.

addition, the deadline for an LFA to file a formal Form 329 complaint with the Commission should be 30 days from the LFA's receipt of the operator's rate justification. Thirty days should be more than adequate for an LFA to decide whether there is need for further Commission consideration of the rate increase in question. In this regard, the Commission should make clear that the purpose of submitting a CPST rate justification to the LFA is not to allow the LFA to conduct a full-blown rate review and, consequently, the 30-day period will not be subject to extension under any circumstance.⁵⁰

Without these changes, the process of reviewing CPST rate increases is likely in most cases to extend for a full 270 days (180 days for the filing of a complaint, plus 90 days for Commission review). Not only is such an extended period of uncertainty inconsistent with the desire for expeditious resolution of rate disputes reflected in the establishment by Congress of a 90-day period for the Commission to act on CPST complaints, but it also will undermine the Form 1240 annual rate adjustment methodology. This is because, with a 270-day decision timetable, an operator seeking to calculate its next annual rate adjustment (a process that must begin more than 90 days before the increase is implemented) may not yet know the status of its previous increase. With the changes proposed herein, however, the process is likely to move much more quickly, while still giving the LFA sufficient time to review the operator's response to the complaints.

⁵⁰If the LFA is dissatisfied with the cable operator's response, its recourse is to file a formal Form 329 complaint at the end of the 30-day period.

III. SMALL CABLE OPERATORS.

Section 301(c) of the 1996 Act amends Section 623 of the Communications Act to exempt smaller cable systems from certain rate regulation provisions.⁵¹ Specifically, Section 301(c) adds the following subsection (m) to Section 623 of the Communications Act:

(m) Special Rules for Small Companies. --

(1) In General. -- Subsections (a), (b), and (c) do not apply to a small cable operator with respect to --

(A) cable programming services, or

(B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994, in any franchise area in which that operator services 50,000 or fewer subscribers.

(2) Definition of Small Cable Operator. -- For purposes of this subsection, the term "small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.

The Commission has adopted certain interim rules to implement this new subsection of Section 623 of the Communications Act, and requests comment in the Notice regarding the adoption of final rules to implement this provision. Notice at ¶¶ 23-32, 80-94.

A. The Commission Should Adopt As A Final Rule The 20 Percent Ownership Interest Test For Purposes Of Determining Affiliation Under The Small Cable Operator Provisions Of The 1996 Act.

The Commission's interim rules apply the definition of "affiliate" contained in the existing small system cost-of-service rules for purposes of implementing the small cable

⁵¹1996 Act, § 301(c), to be codified at Communications Act, § 623(m).

operator provisions of the 1996 Act.⁵² Notice at ¶ 26. Under this interim definition of "affiliate," an entity will be deemed affiliated with a small cable operator if that entity holds a 20 percent or greater equity interest in the operator or exercises de jure or de facto control over the operator. Id. The Commission should permanently adopt this 20 percent affiliation test for application to the small cable operator provisions of the 1996 Act.

As discussed previously, the Communications Act, as amended by the 1996 Act, contains separate definitions of the term "affiliate" in Title I and Title VI. The Title I definition expressly recognizes that its application in a particular circumstance depends upon "context" of the situation. In the case of the small system rules, Congress presumably was aware of the existing 20 percent threshold adopted by the Commission for purposes of its small system cost-of-service rules and made no specific effort to change that standard.

Moreover, both the existing small system cost-of-service rules and the small cable operator provisions of the 1996 Act aspire to the same goal, i.e., "minimizing regulation and ensuring access to needed capital for smaller cable entities." Id. In the context of small cable operator regulatory relief, a higher affiliation threshold (such as 20 percent) will result in fewer entities being considered "affiliated" with a small cable operator, and thus, fewer small cable operators will fail to meet the revenue criteria contained in the new Section 623(m)(2) of the Communications Act. Accordingly, a higher affiliation threshold in the small cable operator context will result in more small cable operators qualifying for rate relief under Section 301(c) of the 1996 Act. This is a desirable, *deregulatory* result. For purposes of consistent treatment of small cable operators, the Commission should apply the

⁵²See also 47 C.F.R. § 76.934(a) (definition of "affiliate" for purposes of the small system cost-of-service rules).

20 percent threshold already in place for purposes of its small system cost-of-service rules.⁵³

B. The Commission Should Retain Its Existing Small System Streamlined Cost-Of-Service Rate Regulation Rules.

The Commission also is correct in proposing to retain its existing small system streamlined cost-of-service rate regulation rules,⁵⁴ thereby allowing small systems that do not meet the statutory deregulation test contained in Section 301(c) of the 1996 Act (possibly because of affiliation with an entity or entities whose gross annual revenues exceed \$250,000,000 in the aggregate) to qualify for the streamlined procedures already provided for in the Commission's rules. See Notice at ¶¶ 31-32. As the Commission noted in adopting those streamlined procedures, "[r]elaxing regulatory burdens should free up resources that affected operators currently devote to complying with existing regulations and should enhance those operators' ability to attract capital, thus enabling them to achieve the goals of Congress"⁵⁵ Retaining such existing streamlined procedures as a complement to the new small cable operator rate relief provisions contained in the 1996 Act will ensure that small cable operators fully reap the benefits of deregulation, as intended by Congress.

C. Single Tier Small Cable Operators Should Be Required To Submit Their Deregulation Certification To The Commission, Not To Local Franchising Authorities.

The Commission's interim rules provide that, in cases where a small cable operator offered only one tier of service as of December 31, 1994, and where the relevant LFA is

⁵³See 47 C.F.R. § 76.934(a).

⁵⁴See also 47 C.F.R. § 76.934(h).

⁵⁵Sixth Report and Order and Eleventh Order on Reconsideration in MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 7393, 7407 (1995).

certified to regulate BST rates under the 1992 Cable Act, the small cable operator is instructed to submit a written certification to the LFA that the small cable operator meets all of the statutory criteria for deregulation of the BST. Notice at ¶ 28. The LFA must then determine whether the small cable operator qualifies for deregulation within 90 days of submission of the certification. The small cable operator may challenge any adverse decision by filing an appeal with the Commission within 30 days of the LFA's decision. Id.

Unfortunately, this approach does not, as the Commission intends, "minimize the administrative burdens on operators and franchising authorities." Id. at ¶ 92. Nor does it constitute a "mechanism by which an operator can obtain a prompt determination of small cable operator status with a minimum of paperwork." Id. at ¶ 91. The need to submit a separate deregulation certification to each individual LFA constitutes quite an administrative burden (with accompanying mounds of paperwork) on small cable operators with systems comprised of several communities, each with a different LFA. More disturbing is the possibility that the different LFAs whose communities comprise a single system could issue inconsistent rulings, thereby necessitating costly and time-consuming appeals to the Commission.

To avoid the possibility of such inconsistent rulings, and to minimize administrative burdens, the small cable operator should be required to file its deregulation certification directly with the Commission. This way, the small cable operator could file one certification for each system, with the showing indicating the relevant subscriber numbers for each franchise area. In addition, a certification from a small cable operator's Chief Financial Officer, or a like executive, should suffice for purposes of authenticating the gross revenue figures submitted by a small cable operator in support of its deregulation certification. As

the Commission has recognized, smaller businesses often do not have the extra resources to devote to a full audit of their financial statements, and they should not be required to do so simply to take advantage of relaxed regulations intended to minimize burdens for such businesses. Id. at ¶ 85.

D. The 50,000 Subscriber Threshold Clearly Applies On A Franchise Area-By-Franchise Area Basis.

The Notice seeks comment on the Commission's tentative conclusion that it is the size of the franchise area, rather than the size of the system, that is relevant in determining the applicability of the small cable operator provisions of the 1996 Act. Notice at ¶ 87. As the Commission acknowledges, id., the statutory language of Section 301(c) of the 1996 Act by its plain terms applies to a small cable operator "in any *franchise area* in which that operator services 50,000 or fewer subscribers" (emphasis added). Had Congress intended for the 50,000 subscriber threshold to apply, for example, on a systemwide basis, Congress could have included the term "cable system," a term already specifically defined in the Communications Act,⁵⁶ rather than utilizing the term "franchise area." Congress' failure to utilize a term already specifically defined in the Communications Act can only be interpreted to mean that Congress intended what it actually wrote -- that is, that the 50,000 subscriber threshold applies on a franchise area-by-franchise area basis, and not on any other basis. Accordingly, the Commission's tentative conclusion to this effect is correct.

The Commission also asks for comment on the proper methodology for counting multiple dwelling unit ("MDU") subscribers for purposes of Section 301(c). Id. at ¶ 88. F&W submits that the correct approach is to allow small cable operators to count bulk-rate

⁵⁶Communications Act, § 602(7) as amended by the 1996 Act, §§ 301(a)(2) and 302.

subscribers residing in MDUs based on the equivalent billing unit ("EBU") methodology. As the Commission has previously recognized, actual counts of subscribers receiving service under bulk-rate contracts with MDUs are sometimes not available.⁵⁷ The EBU methodology, in which an approximate subscriber count is calculated by dividing the total annual bulk-rate charge by the basic annual subscription rate for individual households, is specifically outlined in the instructions for FCC Form 325 ("Annual Report of Cable Television Systems") for purposes of determining the number of bulk-rate subscribers, and is also widely used in commercial contexts when such counts are unavailable.⁵⁸ Additionally, the Commission has approved the EBU methodology for purposes of completion of FCC Form 1200.⁵⁹ Thus, small cable operators should be allowed to use this methodology when calculating bulk-rate subscribers in MDUs for purposes of demonstrating compliance with the 50,000 subscriber statutory threshold.

E. The 1996 Act Clearly States That A Small Cable Operator Is Deregulated On All Tiers If The Operator Offered Only One Tier Of Service As Of December 31, 1994.

Section 301(c) of the 1996 Act states, in pertinent part, that the rate regulation provisions of the Communications Act "do not apply to a small cable operator with respect to -- (A) cable programming services, or (B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994" On an interim basis, the Commission has determined that any qualifying small cable operator that offered only a

⁵⁷Public Notice, "Questions and Answers on Cable Television Rate Regulation" (released July 27, 1994) at A1.

⁵⁸Id. at n.1.

⁵⁹Id. at A1.

single tier of cable service subject to regulation as of December 31, 1994 will be exempt from rate regulation on *all* tiers, regardless of the number of tiers the operator currently offers. Notice at ¶ 27. Small cable operators that had more than one tier subject to regulation as of December 31, 1994 will remain regulated on the BST. Id. The Commission seeks comment on whether this interim interpretation should be adopted as a final rule. Id. at ¶ 90.

The Commission has correctly interpreted the statutory provision. Not only is the Commission's reading of Section 301(c) consistent with the statute's plain language, but it also avoids the consumer confusion and additional burdens for the small cable operator that a contrary interpretation would produce. The Commission's approach also ensures that small cable operators are not discouraged from giving their subscribers additional choices by dividing a single BST into separate tiers, thereby creating a "lifeline" BST.⁶⁰ In this regard, F&W wishes to address the Commission's suggestion that the "fundamental nature" of a BST may be significantly altered by the splitting of a single BST into multiple tiers. See Id. at ¶ 89. The Commission has stated, in the negative option billing context, that:

restructuring of tiers and equipment . . . will not bring the negative option billing provision into play if subscribers will continue to receive the *same number of channels* and the same equipment. . . [A]s with other changes in the mix of programming services, restructuring will be subject to the negative option billing provision, if the restructuring effects a

⁶⁰The Commission has recognized that there are "strong social benefits to the creation of a lifeline BST" and that "the creation of a lifeline BST increases the option of consumers and increases competition for services on the upper tiers." See In the Matter of Social Contract for Time Warner, FCC 95-478 (released Nov. 30, 1995) at ¶ 56, appeal pending.

fundamental change in the nature of the service subscribers receive.⁶¹

Thus, according to Commission precedent, simply splitting a single BST into multiple tiers, where subscribers to the new multiple tiers receive the *same* number of channels as they had before the split occurred, does not alter the "fundamental nature" of the original, single BST. In any event, the statutory language of Section 301(c) of the 1996 Act clearly focuses attention on the existence of a single service tier as of December 31, 1994. Any future tier restructuring is simply irrelevant for purposes of this statutory provision.

F. Small System Deregulation Survives The Subsequent Growth Of A Small Operator Or The Acquisition Of A Small Operator By A Large Company.

Small cable operators that currently meet the statutory subscriber and revenue thresholds contained in Section 301(c) of the 1996 Act, and thus, qualify for rate deregulation under that section, should not be subject to reregulation if they subsequently exceed those statutory thresholds, either through internal growth or as a result of an acquisition. Accordingly, the Commission should adopt a "snapshot" approach: if a cable system met the statutory small operator test as of February 8, 1996, the system's CPST rates remain deregulated regardless of subsequent events.

The reasons for allowing small cable operators to retain their deregulated status are readily apparent. As the Commission has recognized, "the small cable operator provisions of the 1996 Act . . . have the . . . intent of minimizing regulation and ensuring access to needed capital for smaller cable entities." Notice at ¶ 26. Such provisions should be viewed as an acceleration of the March 31, 1999 sunset of upper tier rate regulation provided for in

⁶¹Rate Order, 8 FCC Rcd at 5907-08 (emphasis added); see also Comcast Cablevision, 10 FCC Rcd 2106, 2107 (1995).

Section 301(b)(1)(C) of the 1996 Act. Such an acceleration of upper tier rate deregulation for the benefit of small cable operators furthers the goal of loosening the regulatory constraints on such operators so they can devote their resources to effectively serving their subscribers and to corporate growth initiatives.

To penalize small cable operators for meeting such goals by subjecting them to reregulation would subvert the intent underlying the statutory relief provided for such operators. The Commission recognizes as much when it notes that "[t]he addition of subscribers by a system or operator would seem to indicate that the company is responding to consumer demand. We would not want to discourage such responsiveness on the part of cable operators." *Id.* at ¶ 93. Further, such reregulation would result in needless confusion. Complete upper tier rate deregulation is scheduled to occur in less than 3 years. To subject a small cable operator who previously qualified for deregulation to the burdens of reregulation when complete upper tier rate deregulation could be as little as a few months away would constitute an unjustifiable hardship and an administrative nightmare. Surely the deregulatory purpose of the 1996 Act would not countenance such a perverse result.

IV. UNIFORM RATE REQUIREMENT.

Section 301(b)(2) of the 1996 Act establishes a new bulk rate exception to the requirement, established in the 1992 Cable Act, that cable operators maintain uniform rate structures throughout their franchise areas.⁶² The Notice seeks comment on the Commission's tentative conclusion that this exception is limited to situations in which a "bulk discount" is negotiated by the property owner or manager on behalf of an MDU's tenants, and does not permit a cable operator to offer discounted rates on an individual basis to

⁶²1996 Act, § 301(b)(2), to be codified at Communications Act, § 623(d).

subscribers "simply because they are residents of an [MDU]." Notice at ¶ 98. The Commission also has asked whether the bulk discounts permitted under the 1996 Act include discounts offered to MDU residents who are billed individually. Id.

A cable operator should not be restricted in its ability to offer competitive non-uniform rates to subscribers residing in an MDU simply because the MDU's residents are given the option of not taking service. In other words, instead of requiring that a bulk discount be fixed for the MDU as a whole, it should be permissible for the amount of the bulk discount to vary depending on the percentage of residents in the MDU who choose to subscribe. Similarly, the Commission should allow bulk discounts in MDUs where residents are billed individually for their cable service as well as in MDUs where the cable operator receives payment from the MDU owner on behalf of all the residents thereof. The method of billing for cable service should not be a reason differentiating between bulk discounts.⁶³

The Commission has also sought comment on the meaning of the term "multiple dwelling units" as used in the uniform rate provision. Id. at ¶ 99. For purposes of this provision, the definition of an MDU should correspond with the expanded private cable exemption to the statutory definition of the term "cable system." Id. The new private cable exemption includes all facilities on private property, without regard to the nature or common ownership of the property served. In order to provide the benefits of competition as widely as possible, the Commission should construe the term MDU as used in Section 301(b)(2) to correspond to this new, expanded private cable exemption to the definition of a cable system.

⁶³Even where a bulk discount rate is established for all residents of an MDU, it is not at all uncommon for cable operators to bill certain services, such as premium channels, on an individual basis. Such practices also should have no impact on the validity of the bulk discount.

If private cable operators are to be free from both local franchise requirements and rate regulation in serving customers in mobile home parks, private housing developments, or other dwelling units where service does not require occupancy of public rights-of-way, then the franchised cable operator should be free to compete for such subscribers by offering volume discounts.

Finally, the Commission has asked commenters to address the standards that should be applied to determine whether a complaint alleging the existence of predatory pricing has made out a "*prima facie*" showing for predatory pricing, and whether the procedures used in the adjudication of program access complaints should be adopted for predatory pricing complaints as well. *Id.* at ¶ 100. F&W agrees with the Commission that allegations of predatory pricing "should be made and reviewed under principles of federal antitrust law as applied and interpreted by the federal courts." *Id.*

It is important to remember that, unlike some state antitrust laws, federal antitrust law does not proscribe "predatory pricing" as such.⁶⁴ Rather, the federal courts have held that predatory pricing can be an element of the offense of monopolization or attempted monopolization, which violates Section 2 of the Sherman Act.⁶⁵ "Monopolization" has been defined as the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power by some overt act.⁶⁶ "Attempted monopolization" consists of (1) a specific intent to control prices or exclude competition in the relevant

⁶⁴The only federal law that *directly* regulates pricing is Section 2(a) of the Robinson-Patman Act, which prohibits price discrimination in the sale of commodities of like grade and quality between similarly situated buyers. 15 U.S.C. § 15(a).

⁶⁵15 U.S.C. § 2.

⁶⁶United States v. Grinnel Corp., 384 U.S. 563, 570-571 (1966).

market, (2) one or more unlawful overt acts in furtherance of that objective and (3) a dangerous probability of success.⁶⁷ Both of these offenses focus on changes in the overall state of the market, not just on the narrow question of the defendant's prices; and the federal antitrust jurisprudence that has developed around the concept of "predatory pricing" has been careful to recognize that low prices are a benefit to consumers. Thus, the courts' task has been to distinguish socially beneficial conduct (lower prices) from those few instances where discounting may be socially harmful because it threatens the existence of competition itself.

In this effort, federal courts have always required a showing of more than mere price-cutting. The courts have searched for some characteristic about the price-cutting that renders it socially harmful. While federal antitrust law has defined predatory pricing as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run,"⁶⁸ it has declined to determine what is the "appropriate measure of cost."⁶⁹ Rather than establish a formula for the appropriate measure of cost, federal courts have focused on one or more of three separate factors in evaluating a predatory pricing claim: (1) price-cost analysis; (2) predatory intent; and (3) likelihood of recoupment.⁷⁰

With the foregoing principles in mind, F&W urges the Commission to adopt a standard for determining whether a complainant has made a threshold showing of predatory

⁶⁷See, e.g., Abcor v. AM International, Inc., 916 F.2d 924, 926 (4th Cir. 1990).

⁶⁸Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117 (1986).

⁶⁹See, e.g., Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341 n.10 (1990); Cargill, 479 U.S. at 117-18 n.12.

⁷⁰See ABA Antitrust Law Developments (Third), Vol. I at 227.

pricing that is objective, and administratively feasible to process and oversee. This threshold showing should be crafted so as to ensure that a cable operator's commercially sensitive cost information should not be forced by federal regulation to be made available to competitors routinely.

Apart from establishing a threshold showing requirement, the Commission should require a party complaining of predatory pricing to demonstrate that the MDU in question is a matter of competitive significance in the cable operator's franchised territory. One way of doing so would be to establish that the MDUs which are the subject of the predators pricing claim represent 15 percent or more of the total number of housing units in the cable operator's franchised territory. Thus, for example, if the cable operator's franchised territory contains 10,000 homes, a pricing complaint relating to MDU buildings of less than 1,500 units would never make the threshold showing, regardless of how low the price was. Fifteen percent is suggested on the basis of the Congressional determination, in the original 1992 Cable Act effective competition standard, that non-LEC affiliated competition that fails to achieve a 15 percent share is not significant.

The reason for requiring the additional showing described above is to ensure that consumers are not threatened with deprivation of the benefits of unfettered price competition unless there is some chance that such competition might have generally harmful effects in the long term. The uniform pricing provisions in the 1992 Cable Act, as amended by the 1996 Act, are not intended to protect inefficient MVPDs; rather, they are intended to protect consumers from the loss of competition that would occur if all MVPDs but one left the market. In that sense, the Congressional goal here is no different than it is for the antitrust laws: the protection of competition. It would be unfortunate if, in the name of protecting

competition, the Commission were to deprive consumers of its benefits. In light of the fact that "predatory pricing schemes are rarely tried, and even more rarely successful,"⁷¹ the Commission should not set a low threshold showing which would only allow complainants to harass their competitors and would harm consumers by discouraging price cutting.

Lastly, F&W supports the Commission's proposal to apply the discovery procedures set forth in the rules for the adjudication of program access complaints in the context of predatory pricing complaints. Notice at ¶ 100.⁷² We believe that those discovery procedures are adequate for the purpose of investigating predatory pricing allegations, and that the Commission should not squander resources drafting an entirely separate set of discovery procedures in this proceeding. However, to the extent a competitor makes a *prima facie* showing of predatory pricing, a cable operator should not be required to disclose sensitive cost data to the public or its competitors. Rather, the rebuttal showing should be submitted to the Commission for *in camera* review.

V. TECHNICAL STANDARDS.

Section 301(e) of the 1996 Act amends Section 624(e) of the Communications Act to limit the ability of local franchising authorities to regulate in the areas of technical standards, scrambling and other signal transmission technologies, and the subscriber equipment utilized by cable operators. Prior to passage of the 1996 Act, Section 624(e) provided:

Within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology. A

⁷¹Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

⁷²See also 47 C.F.R. §§ 76.1003(g), (j).

franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed under this subsection. A franchising authority may apply to the Commission for a waiver to impose standards that are more stringent than the standards prescribed by the Commission under this subsection.⁷³

Section 301(e) of the 1996 Act amended Section 624 by deleting the last two sentences (highlighted above) and adding in their place the following:

No State or franchising authority may prohibit, condition or restrict a cable system's use of any type of subscriber equipment or any transmission technology.⁷⁴

The legislative history accompanying passage of the 1996 Act evidences the unambiguous intent of Congress to preclude local regulatory involvement in the areas of technical standards, customer equipment and transmission technologies as a matter of national communications policy. For example, in describing the provision that became Section 301(e) of the 1996 Act, the House Commerce Committee stated that:

Subsection (j) [now section 301(e)] amends section 624(e) of the Communications Act by prohibiting States or franchising authorities from regulating in the areas of technical standards, customer equipment, and transmission technologies. The Committee intends by this subsection to avoid the effects of disjointed local regulation. The Committee finds that the patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today's intensely dynamic technological environment.⁷⁵

The amendments to the Communications Act embodied in Section 301(e) of the 1996 Act limit the authority of LFAs over technical standards and related issues in three specific ways. First, LFAs may no longer require, as part of the grant, modification, renewal or

⁷³47 U.S.C. § 544(e) (emphases added).

⁷⁴1996 Act, § 301(e), to be codified at Communications Act, § 624(e).

⁷⁵House Report at 110 (1995).

transfer of any franchise, provisions that allow them to enforce any technical standards applicable to cable television systems that are adopted by the Commission. Second, LFAs may no longer request that the Commission allow them to impose or enforce technical standards that are more stringent than the Commission's standards. Third, no State or LFA may interfere with a cable operator's right to deploy any subscriber equipment or transmission technology that it deems appropriate, including scrambling or other forms of encryption.

Thus far, the Commission has implemented only two of these three specific amendments. Specifically, the Commission has eliminated Note 6 to Section 76.605 of its rules, which permitted a franchising authority to apply to the Commission for a waiver to impose technical standards that are more stringent than the standards prescribed by the Commission. The Commission has also inserted the new language that was added to Section 624(e) prohibiting states and LFAs from interfering with the subscriber equipment or transmission technology decisions made by the cable operator. Notice at ¶ 42. The Commission has failed, however, to implement the third specific change mandated by Congress which eliminates day-to-day LFA oversight and enforcement of technical standards compliance issues as part of any franchise, modification, renewal or transfer.

Because the Commission has in the past allowed LFAs in the first instance to engage in the day-to-day oversight and enforcement of the Commission's technical standards, the Commission has sought comment on the overall scope and meaning of new Section 624(e) of the Communications Act. Specifically, the Commission notes that Congress did not amend Sections 626 or 621 of the Communications Act, which allow LFAs to consider signal quality and an operator's technical qualifications in awarding or renewing a franchise to

provide cable service. Id. at ¶ 104. Implicit in this observation is that Congress may not have intended to entirely preclude local regulation and enforcement of technical standards.

Congress could not have been more clear in its purpose in adopting its amendments to Section 624(e) of the Communications Act. The statutory changes to Section 624 and the legislative history explaining those changes leave no doubt that Congress intended to entirely preclude LFA involvement in the establishment or day-to-day enforcement of technical standards applicable to cable television systems. The Commission is simply not free to ignore the fact that Congress specifically deleted the sentence in former Section 623(e) which expressly allowed local franchising authorities to enforce the standards adopted by the Commission. Had Congress desired to allow local franchising authorities to continue to enforce Commission mandated technical standards, it would not have deleted the language in Section 624(e) which expressly granted LFAs such enforcement powers.

The Commission has requested comment on how Congress' amendment to Section 624(e) affects the LFA's power to take into consideration technical standards issues in granting a franchise pursuant to Section 621 of the Communications Act and in evaluating a franchise renewal pursuant to Section 626 of the Communications Act. Id. The simple answer to this question is that, while local franchising authorities are no longer free to establish their own technical standards or to enforce the Commission's technical standards on a day-to-day basis, they may take compliance with the Commission's standards into account in granting an initial or renewal franchise.⁷⁶

⁷⁶In a similar manner, § 626(c)(1)(A) of the Communications Act allows LFAs to consider compliance with applicable laws in deciding whether to renew a cable operator's franchise even though applicable law may not necessarily give rise to any enforcement authority on the part of an LFA directly.

As the Commission has noted, Section 621 of the Communications Act provides that a franchising authority "may require adequate assurance that the cable operator has the . . . technical . . . qualifications to provide cable service." Id., citing Communications Act, § 621(a)(4)(C). This language speaks only to the relevant lines of inquiry which a franchising authority can undertake in deciding whether or to whom a franchise should be awarded. Thus, pursuant to Section 621, an LFA may properly inquire into and require an applicant for a franchise to provide documentation and other information as to the number of systems which it operates, how long it has operated these systems, the channel capacity and services offered by those systems, whether the applicant initially designed and constructed the systems, the qualifications of the cable operator's engineering and other management staff, and any other information which would allow the cable operator to demonstrate that it has the technical qualifications to construct and operate the type of cable system for which it seeks to obtain a franchise. Nothing in Section 621 suggests that an LFA is empowered to adopt or enforce technical standards as part of its local regulatory authority. Indeed, the amendments to Section 624(e) make clear that an LFA may no longer do so.

Similarly, nothing in Section 626, governing franchise renewals, gives the LFAs the authority to adopt their own technical standards or enforce existing Commission technical standards as part of their local franchise responsibilities. Section 626 merely allows an LFA to consider the adequacy of the cable operator's signal quality as one of several factors in determining whether the operator's past service has been adequate to meet community needs. To this end, during the renewal process, an LFA may take into account any determinations that have been made regarding whether or not the cable operator has complied with Commission technical standards in judging the adequacy of the cable operator's services. In

the past, those determinations may have been made by either the Commission or by the LFA under Section 624(e). As a result of the amendments made by the 1996 Act, such determinations now must be made by the Commission alone. In cases where there is a dispute as to signal quality or whether a cable operator is operating in compliance with the Commission's technical standards, the local franchising authority remains free to petition the Commission for a determination of compliance and any enforcement action that may be warranted under the circumstances and to consider the Commission's determination as one of many factors in determining whether to renew the operator's franchise.

Finally, the Commission itself notes that the ability of an LFA to specify criteria, such as a system upgrade, upon which a renewal proposal will be based is expressly made "subject to Section 624" of the Communications Act. *Id.* This language encompasses the limitations added to Section 624(e) precluding LFAs from adopting or engaging in the day-to-day enforcement of technical standards, transmission technologies or subscriber equipment. There simply was no need for Congress to make any separate amendment to the existing language of Section 626 in order to implement the changes made in Section 624(e), since Section 626, by its own express terms, is subject to all limitations contained in Section 624.

VI. SUBSCRIBER NOTICE.

In Section 301(g) of the 1996 Act, Congress established a new federal standard with respect to the provision of notice to subscribers by cable operators regarding service and rate changes.⁷⁷ Under Section 301(g), which amends Section 632 of the Communications Act,

⁷⁷1996 Act, § 301(g), to be codified at Communications Act, § 632(c).

[a] cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion. Notwithstanding Section 623(b)(6) or any other provision of this Act, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any federal agency, state, or franchising authority on the transaction between the operator and the subscriber.

The Commission has implemented Section 301(g) by amending its rules to track the language of the statute. Notice at ¶ 38.

Although both Section 301(g) of the 1996 Act and the Commission's revised rules clearly state that the method of providing subscriber notice is left to the cable operator's "sole discretion" and that cable operators "shall not be required" to provide prior notice of certain enumerated rate changes, it is crucial that the Commission take the further step of plainly and unequivocally acknowledging the preemptive force of Section 301(g) with respect to inconsistent state and local requirements. In particular, it is essential that the Commission make clear that state and local consumer protection and customer service requirements specifying the means by which cable operators must notify subscribers of rate and service changes (e.g., requiring such notice to be included on the customer's bill) are no longer enforceable.

Absent such an express declaration by the Commission regarding the preemptive effect of Section 301(g) and the Commission's implementing rules, it is all but certain that disputes regarding the provision of subscriber notice will arise between cable operators and LFAs.⁷⁸ For instance, some LFAs may argue that, even as amended by Section 301(g),

⁷⁸As the Commission is well aware, disputes regarding the preemptive effect of provisions of the Communications Act and the rules adopted pursuant thereto often arise